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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

L. O. WARD d/b/a L. O. WARD OIL AND GAS OPERATIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 598 F.2d 1187. The opinion of the district court (Pet. App. 22a-35a) is reported at 423 F. Supp. 1352.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20a-21a) was entered on May 10, 1979. On August

2, 1979, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including September 7, 1979. The petition was filed on September 7, 1979, and granted on November 5, 1979 (A. 16, 62). The jurisdiction of the Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a proceeding under the Federal Water Pollution Control Act for the assessment of a "civil penalty" against the individual owner or operator of a facility from which oil was discharged in violation of the Act, is a "criminal case" within the meaning of the Self-Incrimination Clause of the Fifth Amendment to the Constitution in which the government is barred from using any information about the discharge that the individual is required by the Act to report under pain of criminal sanctions.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 311(b) of the Federal Water Pollution Control Act,[1] 33 U.S.C. (Supp. IV 1974) 1321(b), as in effect when this case arose,[2] provided in pertinent part:

* * * * *

> (3) The discharge of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in harmful quantities as determined by the President * * * is prohibited, * * *.
>
> * * * * *
>
> (5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or

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[1] Since enactment of the Clean Water Act of 1977, the amended Federal Water Pollution Act has commonly been referred to as "the Clean Water Act." However, because this case only directly concerns the pre-1977 version of the statute, we will refer to it as "the Federal Water Pollution Control Act," "the Act," or "the FWPCA."

[2] Section 311 was amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, and the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2468 (see notes 10, 13, 15, 16 and 18, *infra*), but these amendments have no direct bearing on the present case.

facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(6) Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. * * *

* * * * *

Section 311, as in effect when this case arose, is reproduced in its entirety in Appendix D to the petition for a writ of certiorari (Pet. App. 36a-57a).

STATEMENT

1. On or about March 23, 1975, oil escaped from an oil retention pit at a drilling facility on premises leased by respondent L. O. Ward, d/b/a L. O. Ward Oil and Gas Operations, near the City of Enid, Oklahoma (Pet. App. 2a, 23a; Tr. 47-48; A. 19, 29, 44-45). On March 25, a sanitarian with the Oklahoma State Department of Health, conducting a routine inspection of a landfill near respondent's property, observed that oil had seeped from the retention pit, down a gully, and into Boggie Creek (Tr. 47-51; A. 44-47), a tributary of the Arkansas River system (Pet. App. 2a). On the same day, one of respondent's employees received a telephone call from the Oklahoma State Department of Health, notifying him of the discharge (Tr. 77; A. 51).

As required by Section 311(b)(5) of the FWPCA,[3]

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[3] Section 311(b)(5) provides that the person in charge of a facility shall immediately notify the "appropriate agency" of the federal government as soon as he has knowledge of a discharge of oil or a hazardous substance from the facility in violation of Section 311(b)(3) of the Act. The latter section prohibits the discharge of oil or hazardous substances into navigable waters or adjoining shorelines in quantities determined in regulations issued by the President to be "harmful." Because the oil discharged in the present case was visible on the surface of Boggie Creek (Tr. 50; A. 46-47), it was in a "harmful" quantity under the applicable regulations, 40 C.F.R. 110.3 (1974), issued by the Administrator of EPA pursuant to authority delegated by the President in

respondent notified the regional office of the Environmental Protection Agency (EPA) by telephone on April 2 that a discharge of oil had taken place.[4] Respondent submitted a more complete written report of the discharge to EPA on June 25 (Plaintiff's Exh. 1; A. 21-23, 31), as required by Section 308(a)(A) of the FWPCA, 33 U.S.C. 1318(a)(A).[5]

Section 1 of Exec. Order No. 11735, 3 C.F.R. 793 (1971-1975 Compilation).

In Section 7 of the same Executive Order, the President designated the Coast Guard as the "appropriate agency" for purposes of receiving the notice of a discharge required by Section 311(b)(5). Current Coast Guard regulations provide that such notification may be given, *inter alia*, to the government official predesignated as the On-Scene Coordinator for the geographic region in which the discharge occurs. 33 C.F.R. 153.203(a)(2). The Administrator of EPA is responsible for furnishing the On-Scene Coordinator for inland waters, 33 C.F.R. 153.103(p), and EPA is therefore an appropriate agency to receive notification under Section 311(b)(5). Notice to EPA apparently was also appropriate at the time of the discharge in this case. 33 C.F.R. 153.203(a); 33 C.F.R. 153.105 (1975). Cf. *United States* v. *Kennecott Copper Corp.*, 523 F.2d 821, 824 (9th Cir. 1975).

[4] A memorandum of the conversation prepared by the EPA employee who received the telephone call was included as part of the administrative record but not introduced at the trial de novo in the district court. Because this memorandum is relevant to the constitutional issue presented, it was included as an appendix to the government's brief in the court of appeals and is reproduced in the Appendix in this Court (A. 17-18).

[5] Section 308(a)(A) of the FWPCA authorizes the Administrator of EPA to require the owner or operator of any point source of effluents to make such reports, maintain such records, and provide such other information as the Administrator may require in order to enable the Administrator to develop effluent or other limitations, to determine whether a person has violated existing limitations or standards, or to carry out other provisions of the FWPCA. There are civil and criminal penalties for the failure to comply with these requirements. 33 U.S.C. 1319(c) and (d).

By letter apparently sent in late May of 1975, EPA requested respondent to submit a written report of the discharge and advised him that failure to do so could result in imposition of civil or criminal sanctions. (This letter was not included in the record in the district court, but because it is part of the administrative record and relates to the constitutional issue presented, it is reproduced in the Appendix (A. 19-20)). Because respondent was therefore compelled to submit this report to EPA under Section 308, use of that report in the collection of a civil fine from respondent raises the same constitutional question as does the use of information furnished by respondent on April 2 to the "appropriate agency" (again, in this instance, EPA; see note 3, *supra*) as required by Section 311(b)(5) of the Act.

By letter dated August 15, 1975 (A. 24-25), EPA forwarded respondent's June 25 report of the discharge to the Coast Guard (Pet. App. 3a), which is responsible for assessing civil penalties under Section 311(b)(6) of the Act against those responsible for the discharge of "harmful" quantities of oil or hazardous substances into or upon navigable waters or adjoining shorelines. On December 19, 1975, following notice and opportunity to be heard, the Coast Guard assessed a civil penalty against respondent in the amount of $500 (Pet. App. 3a). There is no indication in the record that this assessment was based on information other than that forwarded to the Coast Guard by EPA, which had in turn received the information from respondent pursuant to Sections 311(b)(5) and 308(a)(A) of the Act. Re-

spondent filed an administrative appeal from this ruling, contending that the reporting and enforcement scheme violated his Fifth Amendment privilege against compulsory self-incrimination, but this administrative appeal was denied (Pet. App. 3a, 23a; A. 26-28).

2. On April 13, 1976, respondent filed suit in the United States District Court for the Western District of Oklahoma against the Secretary of Transportation, the Commandant of the Coast Guard, and the Administrator of EPA to enjoin enforcement of Sections 311(b)(5) and (6) and collection of the administratively assessed penalty (Pet. App. 3a). Respondent moved to convene a three-judge court pursuant to 28 U.S.C. (1970 ed.) 2282.[6] On June 4, 1976, the United States filed a separate action in the district court to collect the unpaid penalty (Pet. App. 3a). The court denied respondent's motion to convene a three-judge court on the ground that no substantial challenge to the constitutionality of the statute was presented (Pet. App. 23a n.2) and ordered the two cases consolidated (*id.* at 24a).

The court denied respondent's motion for summary judgment, in which he again argued that the civil penalty described in Section 311(b)(6) is criminal or "quasi-criminal" in nature and that use of information furnished under the self-reporting scheme therefore violated his Fifth Amendment privilege

[6] Section 2282 of Title 28, United States Code, was repealed by Section 2 of Pub. L. No. 94-381, 90 Stat. 1119 (August 12, 1976), but, under Section 7 of that Act, 90 Stat. 1120, it remained in effect with respect to cases previously filed.

against compulsory self-incrimination (Pet. App. 24a-31a, 35a).

The court reasoned that whether a given sanction is civil or criminal is a question of statutory construction (Pet. App. 24a, citing *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972)). The court found (Pet. App. 26a) that Section 311(b)(6) is "unambiguous" in this regard and that "congressional intent to impose a civil penalty can be discerned from its face." The court concluded (*ibid.*) that the penalty is expressly labelled "civil," provision for administrative assessment of the penalty is indicative of congressional intent to impose a civil sanction, and the civil nature of the penalty is underscored by its juxtaposition with a provision for *criminal* penalties in the immediately preceding Section 311(b)(5) for those who fail to report a discharge immediately to the appropriate agency of the federal government. The court also found (Pet. App. 27a-31a) the civil nature of the penalty to be supported by reference to the factors set forth in this Court's decision in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), quoted at pages 34-35, *infra*.

The case was then tried to a jury,[7] which found that oil from respondent's facility did spill into Boggie Creek (Tr. 135; A. 58). The court reduced the penalty to $250 in view of the amount of oil that escaped and its conclusion that respondent had been

[7] A jury trial was not required by the Seventh Amendment. *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977).

diligent in his clean-up efforts after the discharge was discovered (Tr. 138-139; A. 60-61).

3. The court of appeals reversed (Pet. App. 1a-19a), holding that the civil penalty proceeding in Section 311(b)(6) is criminal in nature, at least for purposes of the Self-Incrimination Clause of the Fifth Amendment, and that notification given to the appropriate agency as required by Section 311(b)(5) could not be used in determining either liability for or the amount of the civil penalty assessed under Section 311(b)(6).

The court acknowledged the "remedial" purpose of the provision (Pet. App. 9a), reflected in the statutory direction to pay the civil penalties assessed under Section 311(b)(6) into a revolving fund to defray the costs of administration and enforcement of Section 311 and of cleaning up oil spills where those costs are not otherwise recoverable (see Section 311(k), 33 U.S.C. 1321(k); Pet. App. 53a). But, in concluding that the civil penalty provision is nevertheless penal or criminal for purposes of the Self-Incrimination Clause, the court relied (Pet. App. 9a-12a) upon the requirement that a civil penalty be assessed in every case without regard either to fault for the discharge or the subsequent mitigation of damage through clean-up efforts; this automatic assessment, the court concluded, is indicative of a punitive or retributive purpose. The court found (Pet. App. 11a-12a, 14a, 17a) the punitive or retributive purpose of the penalty to be reenforced by implementing instructions issued

by the Commandant of the Coast Guard (A. 38-40).[8] These instructions stated that the Coast Guard would assess some penalty in every case, that a penalty at or near the maximum of $5000 would be assessed unless one of the factors listed in Section 311(b)(6) justified a lesser penalty, that the degree of culpability and prior record of the person responsible for the discharge would be taken into account, and that the penalty would not be based on the responsible party's clean-up effort or expense. The court also attached importance to the fact that the conduct involved—a discharge into navigable waters—may already be a crime under Sections 13 and 16 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407 and 411 (Pet. App. 13a, 15a-16a, citing *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)), and what it viewed as the possibly excessive amount of the penalty in relation to the remedial purposes ascribed

[8] Commandant Instruction 5922.11A (Feb. 23, 1973) relied upon by the court of appeals, was reprinted in an appendix to the opinion in *United States* v. *LeBeouf Bros. Towing Co.*, 377 F. Supp. 558, 568-570 (E.D. La. 1974), rev'd, 537 F.2d 149 (5th Cir. 1976), cert. denied, 430 U.S. 987 (1977). Neither petitioner nor respondent cited or relied upon this Instruction in the briefs in the court of appeals, and that Instruction had been superseded by Instruction 5922.11B (Oct. 10, 1974) by the time of the occurrences and decisions in this case. Instruction 5922.11A is reprinted in the Appendix (A. 38-40), and pertinent portions of Instruction 5922.11B are reprinted as an Appendix to this brief (App., *infra*, 1a-7a). The Coast Guard is in the final stages of preparing a revision of the Instruction, which will then be incorporated as a new chapter in the Coast Guard Merchant Marine Safety Manual. The revision, undertaken in part to reflect the 1977 and 1978 amendments to Section 311, is not expected to depart materially from the existing Instruction 5922.11B in areas relevant to this case.

to it where the penalty is assessed without regard to fault (*id.* at 16a-17a).

The court did not strike down either the self-reporting requirement in Section 311(b)(5) or the civil penalty provision in Section 311(b)(6); instead, it fashioned a use and derivative use immunity and remanded the United States' collection suit to the district court for further proceedings consistent with its opinion.[9]

SUMMARY OF ARGUMENT

The Federal Water Pollution Control Act, 33 U.S.C. (Supp. IV 1974) 1251 *et seq.*, sets forth a comprehensive statutory framework "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). In furtherance of this goal, Section 311 of the Act, 33 U.S.C. 1321, regulates the discharge of oil and hazardous substances into the Nation's waters.

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[9] The court of appeals also concluded (Pet. App. 4a-6a) that the district court had properly declined to convene a three-judge court pursuant to 28 U.S.C. (1970 ed.) 2282 in the action brought by petitioner. The court of appeals noted that a judgment for respondent in the district court would not have restrained enforcement or operation of the FWPCA because the self-reporting system would have remained intact, and civil penalties could still have been assessed if the government proved its case on the basis of information other than that derived from the notification required by Section 311(b)(5). See also *Flemming* v. *Nestor*, 363 U.S. 603, 607 (1960). The court therefore remanded respondent's injunctive action to the district court with instructions to dismiss (Pet. App. 19a, 21a). Neither petitioner nor respondent has sought review of the court of appeals' remand of that action, and there is, as a result, no issue before the Court regarding the convening of a three-judge court.

Section 311(b)(3) prohibits the discharge of "harmful" quantities of oil and hazardous substances into the waters. Section 311(b)(5) requires the person in charge of any facility from which oil or a hazardous substance is discharged in violation of Section 311(b)(3) to immediately notify the federal government so that prompt clean-up and mitigation measures may be taken. Section 311(b)(5) expressly provides, however, that this notification and information derived from it may not be used against the reporting person "in any criminal case." Section 311(b)(6) provides that a "civil penalty" shall be assessed against the owner or operator of the vessel or facility where the discharge occurred, the amount of the penalty to be determined according to the gravity of the violation, the size of the business operation, and the effect of the penalty on the ability of the owner or operator to remain in business.

The privilege against compulsory self-incrimination applies only in a "criminal case." The court of appeals held that the "civil penalty" prescribed in Section 311(b)(6) is criminal in nature and that information about a discharge the person in charge of a facility or vessel is required by Section 311(b)(5) to furnish the federal government cannot, under the Fifth Amendment privilege, be used in the proceeding to assess and collect the penalty. This conclusion was plainly in error.

A. The question whether a given penalty is criminal or civil is one of legislative intent. Here, Congress could not have been clearer in expressing in the very language of the Act its intent that the penalty is civil, not criminal in nature. It is denomi-

nated a "civil penalty," and the administrative procedure for its assessment demonstrates that it was not intended to be criminal. Moreover, in the immediately preceding Section 311(b)(5), Congress provided what are plainly criminal sanctions for the failure to notify the federal government of a discharge, thereby demonstrating that it knew how to provide for criminal sanctions when it so desired. Congress was sensitive to the Fifth Amendment implications of the self-reporting scheme, and expressly provided in Section 311(b)(5) that the compelled notification could not be used against the reporting individual "in any criminal case." The quoted language is drawn directly from the Fifth Amendment. Thus, when Congres used the term "civil penalty" in Section 311(b)(6), it must be presumed that it did so advisedly, with full knowledge of the traditional distinction between criminal and civil sanctions, and its judgment that the civil penalty proceeding was not a "criminal case" to which the statutory —and therefore the constitutional—immunity attaches is entitled to great weight.

B. There is, moreover, no indication that this plain language of the Act masks a contrary congressional intent to impose what amounts to a criminal sanction. The penalty is remedial, not punitive, under this Court's cases.

The penalties are paid into a special contingency fund established in the Treasury under Section 311(k), from which the government's costs of cleaning up discharges of oil and hazardous substances are paid. Although the government's clean-up costs may

in many cases be recovered from the owner or operator of the facility or vessel where the discharge occurred (see Section 311(f)(1)), the civil penalties assessed in *all* cases serve to underwrite the government's costs of removing those discharges for which the costs cannot be recovered—because the owner or operator has a statutory defense to liability for clean-up costs, is insolvent, or cannot be identified. Thus, the civil penalty section imposes a type of absolute, enterprise liability for these costs on those who engage in the activity of handling oil and hazardous substances and, as a result, create the risk of causing the discharges into the Nation's waters that Section 311 was intended to prevent.

The civil penalty provision was also intended to deter discharges of oil and hazardous substances by causing those who handle them to take the economic consequences of the penalty into account and to heighten the degree of care they exercise. Finally, the civil penalty may be viewed as compensation to the United States, acting *parens patriae*, for the ecological harm that may be presumed to follow a discharge of oil or a hazardous substance, even where that discharge is cleaned up promptly.

C. The penalty is also plainly not criminal in nature under the analysis suggested in this Court's opinion in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963). A monetary penalty imposes no affirmative disability or restraint on personal liberty, such as the exile involved in *Mendoza-Martinez* itself or disqualification from the practice of a profession involved in the cases cited in that opinion.

Monetary penalties have long been accepted as a legitimate civil remedy, and, accordingly, have not, unlike banishment or professional disqualification, been historically regarded as punishment.

A penalty is imposed under Section 311(b)(6) for all discharges, without regard to fault, and therefore does not come into play only upon a finding of *scienter*—another factor identified in *Kennedy* v. *Mendoza-Martinez, supra*. The penalty is not retributive in its purpose; and while it has the broad, prospective deterrent function of encouraging a higher standard of care by interjecting an additional economic consideration into the handling of oil and hazardous substances, the penalty does not deter in the manner of a criminal sanction by an *in terrorem* effect or by a monetary sanction that is wholly disproportionate to the harm that may be caused.

Although discharges of oil and hazardous substances may in some cases be a crime under the Rivers and Harbors Act of 1899, 33 U.S.C. 407 and 411, the civil penalty in Section 311(b)(6) was not designed as *additional punishment* for violation of those provisions; it imposes a penalty for violation of a different provision, Section 311(b)(3) of the FWPCA, which contains no criminal sanctions. Finally, the civil penalty has remedial purposes not tied to any intent to punish, so that the penalty in this case ($250) and generally (up to a maximum of $5000) cannot be regarded as excessive in relation to those remedial purposes.

D. Nor can the penalty be regarded as "quasi-criminal," implicating the Fifth Amendment privi-

lege against compulsory self-incrimination, even if it is not criminal for purposes of all constitutional protections normally attaching in a criminal proceeding. The Court has made clear that a nominally civil proceeding for the forfeiture of goods or recovery of a monetary penalty can be regarded as criminal only where a finding of liability depends on the commission of an underlying criminal offense. The Fifth Amendment privilege therefore does not apply where the civil penalty is remedial in nature, and is not intended to result in the equivalent of criminal punishment. *Helvering* v. *Mitchell*, 303 U.S. 391, 404 n. 12 (1938).

ARGUMENT

I.

SECTION 311 IS DESIGNED TO PREVENT AND PROVIDE FOR THE CLEAN-UP OF DISCHARGES OF OIL IN FURTHERANCE OF THE ACT'S BROAD REMEDIAL PURPOSE TO MAINTAIN THE INTEGRITY OF THE NATION'S WATERS

The Federal Water Pollution Control Act, 33 U.S.C. (Supp. IV 1974) 1251 *et seq.*, sets forth a comprehensive statutory framework designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). As a part of this overall plan, Section 311 of the Act, 33 U.S.C. 1321,[10] regulates the discharge of oil and

[10] The substance of Section 311 was first added as Sections 11 and 12 of the Act, 33 U.S.C. (1970 ed.) 1161 and 1162, in 1970. Federal Water Pollution Control Act Amendments of 1970, Pub. L. No. 91-224, Section 102, 84 Stat. 91, 98. These sections were added to replace the Oil Pollution Act of 1924,

hazardous substances into navigable waters in fulfillment of the congressional policy that "there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States * * *." Section 311(b)(1).

Congress employed a number of different measures to accomplish this "no discharge" objective. Section 311(b)(3), as in effect when this case arose, prohibited the discharge into the navigable waters of the United States [11] or upon adjoining shorelines [12]

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33 U.S.C. (1964 ed.) 431 *et seq.*, which had proven to be ineffective because it applied only to discharges that were grossly negligent or willful, because it applied only to vessels and therefore did not cover discharges from stationary sources, and because it did not extend beyond oil to other hazardous substances. The addition of these new sections in 1970 was spurred by the breakup of the tanker *Torrey Canyon*, "with its incalculable damage to the coast of England and its nearly $8 million cleanup cost," and by the Santa Barbara Channel oil spill, which caused "vast" and "appalling" damage to marine life and recreation in the area. See H.R. Rep. No. 91-127, 91st Cong., 1st Sess. 2 (1969); see also S. Rep. No. 91-351, 91st Cong., 1st Sess. 3, 6 (1969). The provisions were combined in Section 311 of the Act (33 U.S.C. 1321) in the comprehensive Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 862 *et seq.*, and with modifications not directly relevant to this case, have been carried forward to the present time.

[11] Boggie Creek is part of the navigable waters of the United States for purposes of Section 311, which is not limited in coverage by technical notions of navigability. See Pet. App. 2a n.1; *United States* v. *Ashland Oil and Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974); 33 C.F.R. 2.05-25(b); 33 U.S.C. 1362(7); cf. *Kaiser Aetna* v. *United States*, No. 78-738 (Dec. 4, 1979), slip op. 9-10.

[12] Section 311(b)(3) also prohibits the discharge of oil and hazardous substances into the "contiguous zone" of waters adjacent to territory of the United States, as established

of oil or hazardous substances in quantities determined by the President under Section 311(b)(4) to be "harmful to the public health or welfare of the United States." The President delegated the function of determining what constitutes "harmful" quantities under this provision to the Administrator of EPA. Exec. Order No. 11735, Section 1, 3 C.F.R. 793 (1971-1975 Compilation). Under EPA regulations in effect now and in 1974, discharges of oil are defined as "harmful" if they violate applicable water quality standards or cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited in or upon either. 40 C.F.R. 110.3. Because the discharge in this case caused a sheen on the surface of Boggie Creek (Tr. 50; A. 46-47), it was of a harmful quantity under the regulation.[13]

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or to be established by the United States under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639, 40 C.F.R. 110.1(g).

[13] In his motion for summary judgment, respondent challenged the validity of the "sheen test" of harmfulness, but this challenge was rejected by the district court (Pet. App. 32a-35a), and respondent did not pursue this issue in the court of appeals. Sections 311(b)(3) and (4) were amended by the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2468, to prohibit the discharge of oil and hazardous substances "in such quantities as *may* be harmful" (emphasis added), as determined by the President. This change was intended to make clear that the Act "does not require an assessment of actual harm in the variety of circumstances in which such substances might be discharged." 124 Cong. Rec. S18995, H13599 (daily ed. Oct. 14, 1978).

Section 311(c)(1) authorizes the President to remove or to arrange for the removal of any oil or hazardous substance discharged into or upon the navigable waters of the United States or adjoining shorelines, unless he determines that the owner or operator of the vessel or facility from which the substance was discharged will properly do so. The government's clean-up costs are paid out of a special revolving fund established in the Treasury by Section 311(k).

The owner or operator of the vessel or facility from which oil or a hazardous substance is discharged in violation of Section 311(b)(3) is liable to the United States for the actual costs incurred by the government in clean-up operations except where the discharge was caused solely by an act of God, an act of war, negligence on the part of the United States, or an act or omission of a third party. Section 311(f). Funds recovered pursuant to this provision are deposited in the revolving fund established under Section 311(k). Although Congress has from time to time appropriated money for the fund, it is in general intended to be replenished by recoveries from those responsible for prohibited discharges.

Section 311(b)(5) of the FWPCA requires "[a]ny person in charge" of a vessel or facility from which oil or a hazardous substance is discharged in violation of Section 311(b)(3) to "immediately notify the appropriate agency of the United States Government of such discharge." This notification enables the federal government to ensure that clean-up and other remedial measures are taken promptly in order to minimize the ensuing damage. See S. Rep. No. 91-351, *supra*, at 16. Failure to notify the appropriate agency immediately is a criminal offense punishable by a fine of up to $10,000 and imprisonment for one year. In recognition of the Fifth Amendment privilege, however, Section 311(b)(5) provides that the "[n]otification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement." [14]

Section 311(b)(6), as it read at the time of the discharge involved in this case, provided that the "owner or operator" of a facility from which oil or a hazardous substance is discharged in violation of Section 311(b)(3) shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating in an amount not to exceed $5,000

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[14] Respondent notified EPA eight days after one of his employees was informed of the discharge (A. 17-18). This notification would not appear to have been "immediate," as Section 311(b)(5) requires. See *United States* v. *Kennecott Copper Corp.*, 523 F.2d 821 (9th Cir. 1975); *United States* v. *Ashland Oil and Transportation Co., supra.* The government argued in the court of appeals that because respondent did not notify the appropriate agency immediately, he could not take advantage of the statutory grant of use and derivative use immunity in Section 311(b)(5), which was intended to implement the Fifth Amendment privilege against self-incrimination. We did not present this question in the petition for a writ of certiorari. See Pet. 2, 8.

for each offense.[15] In determining the amount of the penalty or any settlement thereof, the Secretary is to take into account "the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation." [16]

Civil penalties recovered in proceedings brought under Section 311(b)(6) are paid into the revolving fund established by Section 311(k), along with re-

[15] Section 311(b)(6) was amended by Sections 58(a)(7) and (8) of the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, 1594, to provide that the "person in charge" of a facility is liable for a civil penalty in addition to the owner or operator of the facility.

[16] Section 311(b)(6) was further amended by the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2468, to permit the Administrator of EPA to bring an action directly in the district court to recover a civil penalty of up to $50,000 against the owner, operator, or person in charge of a vessel or facility from which a substance is dicharged in violation of Section 311(b)(3). The amount of the penalty is to be determined by the same three factors utilized by the Coast Guard in assessing a penalty administratively, as well as the "standard of care manifested" and efforts to "minimize or mitigate the effects of such discharge." The penalty may be in an amount of up to $250,000 if the Administrator can show willful negligence or misconduct on the part of the defendant. This provision for the Administrator of EPA to recover a much larger civil penalty in an action in the district court is designed for more serious discharges, and it cannot, by its terms, be utilized if the Coast Guard has already assessed a penalty administratively. EPA recently issued regulations and entered into a memorandum of understanding with the Coast Guard governing the assessment of civil penalties in the district court. 44 Fed. Reg. 50766 (Aug. 29, 1979).

coveries under Section 311(f) from owners or operators of the costs incurred by the United States in cleaning up discharges. Thus, as the court of appeals acknowledged (Pet. App. 9a), the collection of civil penalties in all cases helps defray the cost of cleaning up those oil spills for which the government's clean-up costs are not otherwise recoverable—*e.g.*, where the discharge cannot be traced to a particular source; where the discharge is caused by an act of God, an act of war, or negligence on the part of the United States; where the owner of a facility at which the discharge occurred is insolvent; or where the clean-up costs exceed the limitations on liability established in Section 311(f). Moneys from the revolving fund are also used for implementation of the National Contingency Plan for removal of oil and hazardous substances. See Sections 311(c)(2) and 311(k).

By the operation of these sections, the civil penalty provision furthers the FWPCA's goal of pollution-free water by imposing a type of absolute or enterprise liability on those who engage in activities creating a risk of the discharges the FWPCA was intended to prevent—and by imposing that liability only where the risk has manifested itself in an actual discharge—in order to assist in the funding of clean-up efforts generally. See *United States* v. *Marathon Pipe Line Co.*, 589 F.2d 1305, 1309 (7th Cir. 1978). This reflects a congressional judgment that the industry concerned, rather than the public, should bear the direct costs of the water pollution caused by discharges. *Ibid.*; see also *United States* v. *Tex-Tow, Inc.*, 589 F.2d 1310, 1314-1315 (7th Cir. 1978).

The civil penalty was also expected to have an incremental impact in deterring discharges. S. Rep. No. 91-351, *supra*, at 16. In many cases, the amount of the penalty will be considerably less than the clean-up costs. The clean-up costs (and potential liability to third parties for damages under state or federal law for injury to property)[17] would operate as a significant deterrent to such discharges. But Congress anticipated that there would be other discharges that, although not lending themselves to effective clean-up, would nevertheless "present a hazard to the water environment" (*ibid.*). The civil penalty was expected to discourage these discharges for which clean-up costs were not likely to be recovered (*ibid.*).[18] In those cases in particular, but to an extent in all

[17] Section 311(*o*) provides that nothing in Section 311 shall be construed to affect the liability under federal or state law of an owner or operator of a vessel or facility to the owner of property that is damaged by an oil spill.

[18] At the time of the discharge in this case, Section 311 (b) (2) (B) provided for the recovery of a civil penalty—in effect, liquidated damages—from the owner or operator of a facility or vessel from which a *hazardous substance* was discharged if the Administrator of EPA determined at the time he designated the substance as hazardous that it was not actually removable from water. This provision, enacted in 1972, was expected to discourage discharges of hazardous substances because each carrier or handler would evaluate the risk of discharge and determine whether the potential penalty made engaging in the risk-prone activity worthwhile or whether a higher standard of care was in order. S. Rep. No. 92-414, 92d Cong., 1st Sess. 66 (1971); see also 124 Cong. Rec. S18995 (daliy ed. Oct. 14, 1978). There was, contrary to the court of appeals' apparent belief (Pet. App. 8a-9a), no similarly distinct provision for liquidated damages in the case of *oil* discharges that could not readily be cleaned up in a particular case. The "liquidated damages" provision in Section 311 (b) (2) (B) was effectively repealed by Subsection (b) (3) of the Federal Water Pollution Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2467. The civil penalty assessed under Section 311 (b) (6) can, however, serve the same function by forcing the handler or carrier of oil or hazardous substances to take the monetary cost of a civil penalty into account and to exercise a higher standard of care as a result.

cases, the civil penalty helps to prevent harmful spills "by making care more economical than carelessness" (Pet. App. 29a n.9, quoting *United States* v. *General Motors Corp.*, 403 F. Supp. 1151, 1162 (D. Conn. 1975)). See also *United States* v. *Atlantic Richfield Co.*, 429 F. Supp. 830, 841 (E.D. Pa. 1977), aff'd *sub nom. United States* v. *Gulf Oil Corp.*, 573 F.2d 1303 (3d Cir. 1978). And, as the court of appeals conceded (Pet. App. 16a), the penalty may also be viewed as compensation to the United States (acting *parens patriae*, to preserve the integrity of the Nation's waters for the benefit of the general citizenry) for the presumed ecological harm to the waters resulting from the discharge, even though it may be cleaned up promptly. See *United States* v. *W. B. Enterprises*, 378 F. Supp. 420, 422-423 (S.D. N.Y. 1974); see also *United States* v. *Eureka Pipeline Co.*, 401 F. Supp. 934, 940 (N.D. W. Va. 1975). "[T]he Congress obviously believed: (a) that no clean up effort could be complete because, after discharge, it is impossible to guarantee against residual harm from quantities of oil too small or too well dispersed to be detectable; and (b) that even the transitory pollution of waters was deleterious to the environment." *United States* v. *Atlantic Richfield Co.*, *supra*, 429 F. Supp. at 837.

II.

THE PENALTY ASSESSED UNDER SECTION 311 (b)(6) IS PLAINLY CIVIL IN NATURE, FURTHERING THE ACT'S REMEDIAL PURPOSES

The Fifth Amendment provides that no person shall be compelled "in any criminal case" to be a witness against himself. The court of appeals held that a penalty provided for in Section 311(b)(6), although denominated "civil" is, in reality, "criminal in nature" and that the Fifth Amendment therefore precluded the use in proceedings to assess and collect the penalty of the notice of the discharge respondent was required by Section 311(b)(5) to give to the "appropriate agency" of the federal government. The conclusion may follow if the premise is correct (but see *California* v. *Byers*, 402 U.S. 424 (1971)). But, in our view, the court below wrongly characterized the proceeding in suit as a "criminal case" for purposes of the Self-Incrimination Clause.

"The question of whether a given sanction is civil or criminal is one of statutory construction." *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972); accord, *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938); cf. *Bell* v. *Wolfish*, No. 77-1829 (May 14, 1979), slip op. 16-17. This is not to say, of course, that Congress could effectively dispense with applicable constitutional protections merely by attaching the "civil" label to what is otherwise unquestionably a criminal sanction. *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 421 (2d Cir. 1974); cf. *Bell* v. *Wolfish*, *supra*, slip op. 17 n.20. The proper judicial inquiry in any given case is whether Congress intended the finding of liability under the statutory

provision and the adverse effect on the person involved—here, a monetary penalty—to carry with them the usual implications or consequences of an adjudication of guilt under the criminal law. Among these are the stigma that is intended to attach following a conviction, the legitimacy of characterizing the adverse consequences as punishment, the satisfaction of whatever retributive impulses may underlie the criminal law, and, in appropriate cases, the imposition of disabilities or restraints, such as imprisonment or other custody, expulsion from the jurisdiction, or disqualification from the practice of a profession.

Where Congress intends a finding of liability under a particular statutory provision to carry these consequences normally associated with conviction for commission of a criminal offense, the determination of liability cannot occur, and the penalty provided cannot be imposed, without the protection afforded by the Constitution in criminal cases or prosecutions. But evidence of such congressional intent is wholly lacking with respect to Section 311(b)(6).

A. Section 311(b) On Its Face Manifests A Clear Congressional Intent That the "Civil Penalty" Provided in Section 311(b)(6) Is Civil for Constitutional Purposes

The very language of the Act here, which must be the starting point in statutory interpretation, *Perrin* v. *United States*, No. 78-959 (Nov. 27, 1979), slip op. 4; *TVA* v. *Hill*, 437 U.S. 153, 173 (1978), amply demonstrates that the penalty is not criminal. Congress used the term "civil penalty" in describing the assessment under Section 311(b)(6). It must be assumed, absent compelling evidence of congressional

intent to the contrary, that this term was used advisedly. Congress must be presumed to be aware of the traditional distinction between civil and criminal sanctions, not merely with respect to the procedural protections that must be afforded, but also in the vastly different legal and societal consequences that follow when one is adjudged guilty of a crime on the one hand and, on the other, has paid a mere monetary penalty under a regulatory statute.

For this reason, as Judge Friendly stated, "[w]hen Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress at its word." *United States* v. *J. B. Williams Co.*, 498 F.2d 414, 421 (2d Cir. 1974). This Court has, as a result, repeatedly upheld monetary penalties designated by Congress as civil penalties against contentions that they were actually criminal in nature. See *e.g.*, *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 151-154 (1956); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-552 (1943); *Helvering* v. *Mitchell*, *supra*, 303 U.S. at 400, 402-403; *Chicago, B. & Q. Ry.* v. *United States*, 220 U.S. 559, 577-579 (1911); *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 338-339 (1909); *Hepner* v. *United States*, 213 U.S. 103, 108-111 (1909).

The administrative procedure for assessment of the penalty under Section 311(b)(6) is also indicative of a congressional intent that the penalty be civil. In *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), for example, in which the question presented was whether

a 50% penalty on a federal income tax deficiency was a criminal penalty and therefore barred under the circumstances by the Fifth Amendment protection against double jeopardy, the Court stated:

> That Congress provided a distinctly civil procedure for the collection of the additional 50 percentum indicates clearly that it intended a civil, not a criminal, sanction. Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not appply.

303 U.S. at 402.

But it is not necessary to rely on the language of Section 311(b)(6) alone to determine from the face of the Act that the penalty is civil. In Section 311(b)(5), the *immediately preceding section*, Congress provided for what are clearly criminal sanctions for those who fail to notify the appropriate agency of the federal government of a prohibited discharge:

> Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both.

Thus, when Congress wished to impose a criminal sanction in the Act, it knew how to do so.

Even more significantly for present purposes, however, is Congress' treatment of the Fifth Amendment implications of the self-reporting requirement in Section 311(b)(5). To safeguard the Fifth Amend-

ment privilege, Congress expressly provided in that section that the compelled notification, or information obtained by the exploitation of that notification, shall not be used against the reporting person "in any criminal case." The quoted phrase is, of course, drawn verbatim from the Self-Incrimination Clause. Thus, when Congress termed the monetary assessment in Section 311(b)(6), the very next section, a "civil penalty," it must have been of the view that a proceeding under Section 311(b)(6) is not a "criminal case" for purposes of the immunity granted by Section 311(b)(5) or, therefore, for purposes of the Fifth Amendment. When Congress has shown such a sensitivity to Fifth Amendment concerns by including an express grant of immunity (compare *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968)), and characterized a sanction provided in the same statutory scheme as a "civil penalty" that was intended to be outside of the protection afforded by the statutory and Fifth Amendment immunity, the statutory characterization of the penalty as civil is especially compelling.[20]

[20] Commandant's Instruction 5922.11B, issued in 1974, provides that there is no statutory immunity from the use of the notification in a civil penalty proceeding (App. 2a, *infra*). The administrative construction that a "civil penalty" proceeding is not a "criminal case" for purposes of the statutory (and, therefore, the constitutional) immunity "should be followed unless there are compelling indications that it is wrong." *E.I. duPont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

Finally, the provision for payment of penalties assessed under Section 311(b)(6) into the revolving fund established by Section 311(k) to defray costs of administering Section 311 further demonstrates a remedial, not punitive purpose. *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 549-550 (1943); *Helvering* v. *Mitchell*, *supra*, 303 U.S. at 401.

Thus, in a number of different ways, Section 311(b) unmistakably reveals a congressional intent that the civil penalty in Section 311(b)(6) is indeed civil. This conclusion is reinforced by the decisions of a number of courts that a proceeding under Section 311(b)(6) is not a "criminal case" for purposes of the statutory grant of immunity in Section 311(b)(5), which, as noted above, implements the Fifth Amendment privilege. See *United States* v. *Allied Towing Corp.*, 578 F.2d 978 (4th Cir. 1978); *United States* v. *LeBeouff Bros. Towing Co.*, 537 F.2d 149 (5th Cir. 1976), cert. denied, 430 U.S. 987 (1977); *Apex Oil Co.* v. *United States*, 530 F.2d 1291, 1293 n.7 (8th Cir.), cert. denied, 429 U.S. 827 (1976); *United States* v. *Atlantic Richfield Co.*, 429 F. Supp. 830 (E.D. Pa. 1977), aff'd *sub. nom. United States* v. *Gulf Oil Corp.*, 573 F.2d 1303 (3d Cir. 1978).[21]

[21] None of these cases involved the possible application of the Fifth Amendment privilege because the defendants were corporations, which do not enjoy the privilege. *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 71 (1974). However, because Section 311(b)(5) uses the phrase "in any criminal case" drawn from the Fifth Amendment and was presumably

The court of appeals determined (Pet. App. 9a, 12a), however, in looking to the face of the statute, that a punitive intent—and therefore an intent to impose a criminal sanction—was indicated by the statutory language that a civil penalty "shall be assessed" for a violation. To be sure, the Coast Guard Instructions relied upon by the court of appeals—as well as those actually in effect at the time—support the view that Congress intended that some penalty be assessed in all cases. See A. 38-40; App., *infra*, 1a. But it does not follow that the provision is criminal in nature. The approach may simply be to impose a type of enterprise liability on the basis of the activity engaged in by the person generally—the storage, transportation, processing, or other handling of oil or hazardous substances—which creates an inherent risk of ecological harm, rather than to focus on the degree of fault underlying the specific act or omission at the time of the discharge actually occurred.

The court of appeals also found a punitive tone in the Commandant's Instructions, which give content, *inter alia*, to the phrase "gravity of the offense," one of the factors to be taken into account under the statute in determining the amount of the penalty to be assessed. As implemented in the Instructions, this factor embraces such considerations as the amount of oil discharged, whether the discharge was intentional or negligent, and the prior record of the person

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intended thereby to have the same scope (both for individuals and corporations) as the constitutional privilege, these cases reflect a judicial consensus of the underlying nature of the civil penalty in Section 311(b)(6) that is relevant here.

involved.[22] But, the amount of the oil discharged is clearly relevant if the penalty is viewed as compensation to the government for the ecological harm that is presumed to follow an oil spill, even one that is cleaned up promptly. See page 25, *supra*. So, also, the size of the spill is relevant in allocating the costs of government clean-up and stand-by preparedness measures funded by Section 311(k) to those who, as demonstrated by the magnitude of the particular spill, present the greater risk of the ecological harm Section 311 is designed to prevent.

Similarly, the prior record of the person involved is directly pertinent to the remedial purpose of preventing discharges. A long history of discharges confirms that the person's activities present a greater risk of ecological harm than do the activities of others and that a larger portion of the government's costs associated with administering Section 311 should therefore be allocated to that person. By the same token, if the discharge was intentional or negligent (a factor the Coast Guard instructions also take into account), this activity demonstrates a sufficient disregard for the purposes of the Act, and therefore a sufficient possibility of future harm, such that a proportionately greater penalty is warranted to further the purpose of preventing spills.[23]

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[22] Although the Instructions on which the court relied and those actually in effect at the time are differently worded, these considerations are generally contained in both. See A. 38-40; App., *infra*, 2a-3a.

[23] The court of appeals' conclusion that taking the degree of culpability into account in determining the *amount* of a penalty to be assessed demonstrates an intent to impose

Thus, nothing on the face of Section 311 or the Coast Guard's enforcement of it indicates an intent in the least inconsistent with Congress' characterization of the penalty as civil or with the section's remedial purposes.

B. The Penalty Provided in Section 311(b)(6) Is Also Civil Under the Test Set Forth In *Kennedy* v. *Mendoza-Martinez*

In *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), the Court held punitive a section of the Nationality Act of 1940 which "automatically strip[ped] an American of his citizenship * * * whenever [he] depart[ed] from or remain[ed] outside the jurisdiction of this country for the purpose of evading his military obligations." *Id.* at 166. Accordingly, the Court held that this punishment could not be imposed "without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments." *Ibid.* That result is hardly relevant here. Nor is the primary basis on which it was reached—the Court having concluded that the legislative history of the provision afforded "conclusive evidence of congressional intent" to treat the sanction of de-nationalization as punishment. *Id.* at 169. But the Court went on to identify seven factors useful in determining whether an Act of Congress is penal or regulatory in character (*id.* at 168-169; footnotes omitted).

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criminal sanctions is, of course, inconsistent with the court's earlier conclusion (see page 10, *supra*) that assessment of some penalty in every case without regard to fault (culpability) reflects a punitive intent.

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.

In the present case, the court below invoked this passage to support its conclusion that the Section 311(b)(6) penalty is criminal in nature, and we accordingly consider the several factors here.

1. Whether the sanction involves an affirmative disability or restraint

This factor clearly points to the remedial nature of the Section 311(b)(6) penalty. The type of "affirmative disability or restraint" to which the Court referred was one imposed on *personal liberty*, not the adverse consequences of a monetary assessment. This is evidenced by the Court's citation (372 U.S. at 168 n.22) to *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866), and *United States* v. *Lovett*, 328 U.S. 303 (1946). The former case held that a statute barring from the practice of law in federal courts any person who did not subscribe to an oath that he had not been an active supporter of the Confederacy consti-

tuted punishment for past conduct that was or may have been criminal and was therefore a prohibited *ex post facto* law. Similarly, *Lovett* held that a statute barring the payment of certain named government employees constituted punishment for their supposed subversive activities "without the safeguards of a judicial trial," 328 U.S. at 316, and was therefore a prohibited bill of attainder. *Id.* at 316-318. Cf. *Bell* v. *Wolfish*, *supra*, slip op. 17 n.20 (suggesting that certain restrictions on the liberty of pretrial detainees "may on [their] face appear to be punishment," but that they may in fact be incidents of a lawful nonpunitive governmental objective).

Monetary penalties, on the other hand, do not impose affirmative disabilities or restraints under the *Mendoza-Martinez* analysis. This is indicated by the Court's citation (372 U.S. at 168 n.22) to *Flemming* v. *Nestor*, *supra*, by way of contrast to *Ex parte Garland*, *supra*, and *United States* v. *Lovett*, *supra*. In *Flemming* v. *Nestor*, *supra*, the Court upheld the statutory termination of social security benefits of a person who had been deported because of past membership in the Communist Party. Finding an absence of compelling evidence of punitive intent, the Court rejected contentions that the provision was an *ex post facto* law or bill of attainder and that it resulted in punishment without benefit of a judicial trial. 363 U.S. at 612-621. Significantly, the phrase "affirmative disability or restraint" used in *Mendoza-Martinez* is drawn from a passage in *Flemming* v. *Nestor* (372 U.S. at 617) in which the Court cites *Wong Wing* v. *United States*, 163 U.S. 228 (1896) and *Cummings* v.

Missouri, 71 U.S. (4 Wall.) 277 (1866), both of which involved restrains on liberty,[24] and notes that *Flemming* v. *Nestor* itself involved no such "affirmative disability or restraint."

Thus, the court of appeals erred in concluding that because a monetary penalty may inflict a "pocket-book deterrence or restraint on the recipient" (Pet. App. 13a-14a, quoting *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 518 F.2d 990, 1001 (5th Cir. 1975), aff'd on other grounds, 430 U.S. 442 (1977)), the first of the *Mendoza-Martinez* factors offers "little indication as to Congress' intent" (Pet. App. 14a). A "pocket-book" impact distinctly points to a remedial rather than punitive intent.

2. Whether the sanction has historically been regarded as punishment

This factor, too, clearly supports the remedial, noncriminal nature of the penalty provision. As the Court stated in *Helvering* v. *Mitchell*, *supra*, 303 U.S. at 400:

> Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as

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[24] *Wong Wing* invalidated a statute providing for imprisonment at hard labor, without a criminal trial to establish guilt, of a person unlawfully in the United States, and *Cummings* v. *Missouri* invalidated as an *ex post facto* law a state constitutional provision barring from the clergy any person who failed to subscribe to an oath that he had never supported the Confederacy. *Dent* v. *West Virginia*, 129 U.S. 114 (1889), also cited in *Flemming* v. *Nestor* at the pertinent page, involved a defendant who had been indicted and convicted and is relevant only for its discussion of *Cummings* v. *Missouri*.

> enforcible by civil procedings since the original revenue law of 1789. * * * In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions.

Unlike the historically punitive sanction of exile involved in *Mendoza-Martinez* itself (see 372 U.S. at 168 n.23), and the similarly criminal sanctions involved in the other cases cited in *Mendoza-Martinez* on this point—imprisonment at hard labor, *Wong Wing* v. *United States, supra; Ex parte Wilson*, 114 U.S. 417, 426-429 (1885); *Mackin* v. *United States*, 117 U.S. 348, 350-351 (1886) (discussing *Ex parte Wilson*), and exclusion from a profession, *Cummings* v. *Missouri, supra*—monetary penalties have traditionally been recognized as appropriate civil remedies.

3. *Whether the sanction comes into play only on a finding of scienter*

This factor furnishes no support whatever for the argument that the penalty in Section 311(b)(6) is criminal in nature, because there is no *scienter* requirement for the imposition of a civil penalty under that section. The court of appeals agreed, "at first blush" (Pet. App. 14a), but then resorted to the somewhat inverted logic that Section 311(b)(6) is punitive in this regard because Sections 13 and 16 of the Rivers and Harbors Act of 1899, which may impose criminal sanctions for the discharge of oil and hazardous substances, likewise do *not* contain a *scienter* requirement (Pet. App. 14a, citing *United States* v. *White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974)). We, of course, recognize that a statute may be criminal although it contains no *scienter* requirement. Yet, the absence of such a requirement in Section 311(b)(6) *tends* to establish that the measure is remedial, not criminal.

The court of appeals was also influenced (Pet. App. 14a) by the fact the Commandant's Instructions appeared to contain a *scienter* element in determining the amount of the penalty to be assessed in a given case. See A. 38-40; App., *infra*, 2a-3a. But the only pertinent statutory factor is the "gravity of the offense." This is not the equivalent of a *scienter* requirement. As the implementing instructions make clear, this factor can embrace such considerations as the amount of oil discharged, the degree of care exercised by the discharger, and whether the discharge was intentional. The inquiry under *Mendoza-Martinez*, on the other hand, is whether the penalty "comes into play *only* on a finding of *scienter*." 372 U.S. at 168 (emphasis added). This question must be answered in the negative, both as it pertains to the assessment of at least some penalty and the determination of its amount.

4. *Whether the sanction's operation will promote the traditional aims of punishment—retribution and deterrence*

The court of appeals concluded (Pet. App. 15a) that the deterrence factor does not come into play under Section 311(b)(6) to a significant degree be-

cause the deterrence of spills under the section as a whole results from the provision in Section 311(f) for the recovery of clean-up costs from the owner or operator. We agree that the potential for assessment of a civil penalty will have a relatively small deterrent effect where the potential clean-up liability is substantial. But, as noted above (see pages 24-25, *supra*), Congress expected Section 311(b)(6) to serve some deterrent function, especially where the oil could not readily be removed. This prospective deterrent effect was expected to result because handlers of oil and hazardous substances would make an economic calculation whether the possibility of a penalty warranted the taking of certain risks in the handling of those materials, and it was anticipated that those responsible would be impelled by economic considerations to take protective measures.

Such essentially regulatory deterrence, by imposing additional costs or responsibilities in connection with doing business for the purpose of accomplishing remedial goals, does not render the sanction criminal. This is clear, for example, from *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 337-338 (1909):

> [The Senate] report leaves no doubt that the sole purpose of § 9 was to impose a penalty, * * * to secure the efficient performance by the steamship company of the duty to examine [aliens] in the foreign country, before embarkation, and thereby aid in carrying out the policy of Congress to exclude from the United States aliens afflicted with loathsome or dangerous contagious diseases as defined in the act. The contention that because the exaction which

> the statute authorizes the Secretary of Commerce and Labor to impose is a penalty, therefore its enforcement is necessarily governed by the rules controlling in the prosecution of criminal offenses, is clearly without merit, and is not open to discussion.

The deterrent effect of which the Court spoke in *Mendoza-Martinez* must therefore be more than that which would predictably follow from the assessment of a penalty for remedial purposes. It must, instead, result from an *in terrorem* effect akin to that of being adjudged guilty of a criminal offense or from a monetary penalty far in excess of that reasonably related to the remedial purposes of the provision, as in the two cases cited in *Mendoza-Martinez* (372 U.S. at 168 n.25, citing *United States* v. *Constantine*, 296 U.S. 287 (1935), and *Trop* v. *Dulles*, 356 U.S. 86 (1958)).

Although the court of appeals did not find a prohibited deterrent function in the civil penalty, it did find that Section 311(b)(6) manifested a retributive purpose, at least as implemented by the Coast Guard Instructions. In setting the amount of penalty, the Instructions take into account the gravity of the violation, the degree of culpability, and the prior record of the party and preclude consideration of good faith, the absence of fault, or subsequent clean-up efforts.

As noted above, however (see pages 32-33, *supra*), the gravity of the violation, the prior record, and the degree of culpability are all relevant to the allocation of the special costs of administering Section 311

to those who engage in the activity that creates the risk of the ecological harm the statute was designed to prevent, whatever the nature of the conduct (or absence thereof) at the specific moment of the discharge. Similarly, subsequent cleanup efforts do not erase the fact that the occurrence of the discharge itself confirms that the particular facility poses a risk of discharge or the possibility that ecological harm may have resulted to the waters notwithstanding the clean-up efforts. This is in no sense retributive purpose.[25] Where, as here, the statute's aim is to reach the conduct engaged in, rather than the person engaging in it, it is remedial, not punitive. See *Flemming* v. *Nestor*, *supra*, 363 U.S. at 616, quoting *Cummings* v. *Missouri*, *supra*, 71 U.S. (4 Wall.) at 320 (there must be a persuasive showing of a purpose "to reach the person, not the calling" to find the provision punitive or criminal in nature).

5. ***Whether the behavior to which the sanction applies is already a crime***

The court below found here a clear indication that the Section 311(b)(6) penalty is criminal for present purposes because Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407, makes criminal the discharge of refuse of any kind into the navigable waters of the United States. But the fact that criminal sanctions apply under another statute, passed at a distant time, has little bearing on Congress' intent in enacting Section 311(b)(6). " 'Congress may impose both a criminal and a civil sanction in respect to the same act or omission.' " *One Lot Emerald Cut Stones* v. *United States*, *supra*, 409 U.S. at 235, quoting *Helvering* v. *Mitchell*, *supra*, 303 U.S. at 399. Once again, a consideration of the facts in *Mendoza-Martinez* is in order. In that case, the Court found that Congress had enacted the expatriation provision for the specific purpose of imposing *additional punishment* for conduct that was already criminal under the Selective Service laws but which could not be prosecuted when the violator was outside the country. 372 U.S. at 170-184. There was therefore a clear nexus between an underlying criminal offense and the particular disability.

Such a nexus was also plain in the three cases cited by the Court by way of explaining this factor. All three statutes involved premised liability for a monetary sanction on a finding that the person engaged in conduct that was criminal under a statutory provision referred to in the very section that provided for the monetary penalty. 372 U.S. at 168 n.26, citing *Lipke* v. *Lederer*, 259 U.S. 557, 562 (1922); *United States* v. *La Franca*, 282 U.S. 568, 572-573 (1931); *United States* v. *Constantine*, *supra*, 296 U.S. at 295. See also *United States* v. *United States Coin & Currency*, 401 U.S. 715, 721-722 (1971); compare *One Lot Emerald Cut Stones* v. *United States*, *supra*, 409 U.S. at 236 n.6. It is apparent, then, that the Court in *Mendoza-Martinez* had in mind something substan-

[25] This factor must also be considered in light of the facts of *Mendoza-Martinez* itself, in which the legislative history made unmistakably clear that Congress acted for the repeatedly expressed purpose to *punish* those who left the country in time of need. 372 U.S. at 170-184. See also *Trop* v. *Dulles*, *supra*, 356 U.S. at 96 (plurality opinion).

tially more than the fact that the conduct involved might also be criminal under some other statute or provision. There must be a basis for concluding that Congress specifically intended the sanction in question to be additional *punishment* for engaging in that criminal conduct. There is no basis for such a conclusion here.

Moreover, the Court has held that the fact that a concededly criminal provision falls in a different part of the statutory scheme than the provision whose penal or remedial character is in issue weighs in favor of a finding that the provision in issue is not criminal. *One Lot Emerald Cut Stones* v. *United States*, *supra*, 409 U.S. at 236. Viewed from this perspective, the fact that the conduct here covered by Section 311(b)(6) may also be criminal under the Rivers and Harbors Act, enacted some 70 years earlier, attenuates any relationship to underlying criminal activity to the breaking point. There is no mention of the Rivers and Harbors Act in Section 311(b)(6), nor is there any indication that Congress intended for the civil penalty assessed under Section 311(b)(6) to be an additional punishment for a violation of that statute.[26]

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[26] In fact, although the committee reports do not elaborate, a principal motivation for the incorporation of a statutory grant of immunity under Section 311(b)(5) against the use "in any criminal case" of information about discharges required to be furnished under that section was no doubt to prevent the use or derivative use of that information under the Rivers and Harbors Act. See, *e.g.*, *United States* v. *Republic Steel Corp.*, 491 F.2d 315 (6th Cir. 1974); *United States* v. *Mobil Oil Corp.*, 464 F.2d 1124 (5th Cir. 1972); see

6. *Whether an alternative purpose other than punishment may rationally be ascribed to the sanction*

Although sanctions that have no conceivable legitimate purpose other than to punish are considered punitive in nature, *Kennedy* v. *Mendoza-Martinez*, *supra*; *Trop* v. *Dulles*, *supra*, the sanction will not be regarded as punitive or criminal in nature if the statute may rationally be thought to have another purpose. *Flemming* v. *Nestor*, *supra*, 363 U.S. at 615-617. In the present case, it is clear that a number of alternative purposes may rationally be ascribed to Section 311(b)(6). The court of appeals conceded as much (Pet. App. 16a). It specifically noted the remedial aspects of the penalty resulting from the payment of moneys recovered into the revolving fund established under Section 311(k), which is utilized to defray the costs of administering the program. See also *One Lot Emerald Cut Stones* v. *United States*, *supra*, 409 U.S. at 237; *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 550 (1943); *Helvering* v. *Mitchell*, *supra*, 303 U.S. at 401. The court also conceded the reasonableness of the government's argument that the penalty compensates the United States for tortious

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generally Comment, *Compelled Self-Disclosure and Civil Penalties: The Limits of Corporate Immunity in Oil Spill Cases*, 55 B.U.L. Rev. 112, 114-118 (1975). The fact that Congress termed the penalty in Section 311(b)(6) a "civil penalty" demonstrates that it did not view a proceeding for the assessment of such a penalty as the equivalent of a "criminal case" for purposes of the statutory (and therefore the constitutional) grant of immunity.

damage to the environment (Pet. App. 16a, citing *United States* v. *W.B. Enterprises, supra*). However the court declined to accept this rationale because the factors involved in determining the amount of the penalty did not, in its view, reasonably relate to the possible damage to the environment.

But the statute by its terms states that the "gravity of the violation" is to be taken into account in determining the amount of the penalty, and this has, quite appropriately, been interpreted by the Coast Guard to involve a consideration of the amount of oil discharged. Plainly the amount of oil discharged may in general be though to be reasonably related to the ecological damage to the waters that could result even if the discharge was cleaned up promptly. At the very least, Congress, in addressing the generality of cases, could reasonably have so concluded. Finally, as discussed above, Section 311(b)(6) has the broad remedial purpose of encouraging compliance with the Act's "no discharge" policy through the imposition of a type of enterprise liability on those who engage in risk-prone activity.

7. Whether the sanction appears excessive in relation to the alternative purpose assigned

Where a monetary penalty is "grossly disproportionate" (*United States* v. *Constantine, supra*, 296 U.S. at 295) to the amount that could reasonably be imposed in furtherance of the asserted remedial purposes of the provision, the courts may construe

the penalty as punitive in nature. See also *Bell* v. *Wolfish, supra*, slip op. 17 n.20. However, it is well settled that a civil penalty need not be limited to the amount of the government's actual damages in order to constitute a remedial measure. *One Lot Emerald Cut Stones* v. *United States, supra*, 409 U.S. at 237 (forfeiture of goods for custom law violation); *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 152-154 (1956) ($2000 liquidated damages recoverable by government against fraudulent purchasers of surplus property without proof of actual damages); *United States ex rel. Marcus* v. *Hess, supra*, 317 U.S. at 550 (recovery of double damages by government for filing of false claims); *Helvering* v. *Mitchell, supra*, 303 U.S. at 401 (50% addition to tax deficiency).

Whatever the outer limits of this test, it is clear that a civil penalty of $250 in the present case is not so grossly disproportionate as to smack of punishment. In the vast majority of cases, even the maximum penalty of $5000 could not be considered excessive. Significantly, as well, the statute expressly requires that the penalty be tailored in amount to meet the "gravity of the violation" as well as the size of the business of the owner or operator charged and the effect of the penalty on his ability to remain in business. Thus, far from showing the type of cavalier disregard for the consequences of the penalty that might lead a court to find a punitive intent, Congress manifested a meticulous concern for the appropriateness of the penalty under the circumstances of the particular case.

The court of appeals concluded that the penalty nevertheless "could be excessive" in certain cases, at least where the owner or operator attempted in good faith to clean up and was not at fault for the discharge (Pet. App. 17a). If the statutory factors are properly applied, however, an accidental or otherwise innocent discharge should not result in as severe a penalty as would an intentional or negligent one (other things being equal), because the violation would not be so "grave." Moreover, even where the discharge is innocent or clean-up efforts are diligently pursued, these factors do not erase the fact of the discharge itself, nor do they necessarily erase all ensuing ecological harm (see page 42, *supra*). In any event, speculation that a penalty might prove excessive in some future case (the court of appeals did not expressly find the penalty excessive in *this* case) does not support the conclusion that Congress must have intended the sanction to be criminal in all cases. The more prudent judicial course would be to invalidate an excessive penalty in whatever case it may be imposed on the theory that it is inconsistent with the statutory scheme.

Thus, *each* of the factors enumerated by the Court in *Kennedy* v. *Mendoza-Martinez*, *supra*, supports the conclusion that the "civil penalty" under Section 311(b)(6) was intended by the Congress to be exactly that.

III.

THE PROCEEDINGS UNDER SECTION 311(b)(6) FOR ASSESSMENT OF A CIVIL PENALTY ARE NOT "QUASI-CRIMINAL" FOR PURPOSES OF THE FIFTH AMENDMENT PRIVILEGE

Respondent argued in the court of appeals (Appellant's Br. 11-22) that even if Section 311(b)(6) does not state a criminal offense for purposes of all constitutional protections applicable in criminal prosecutions, it should nevertheless be regarded as criminal for purposes of the Fifth Amendment privilege against compulsory self-incrimination. The court below did not specifically address this argument, although it did note (Pet. App. 18a n.7) that it was not deciding the question whether Section 311(b)(6) is criminal for any purpose other than the Fifth Amendment privilege—perhaps thereby suggesting that the privilege does have something of the broader reach respondent urged the court to consider.

Respondent primarily relied on *Boyd* v. *United States*, 116 U.S. 616 (1886); *Lees* v. *United States*, 150 U.S. 476 (1893); and *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971). Those cases, however, do not stand for the proposition that monetary penalties that are plainly civil in character should nevertheless be regarded as criminal in order to further the "policies" of the Fifth Amendment. The Amendment by its terms applies only to a "criminal case," and there must therefore be a dem-

onstration that the procedure for imposition of the penalty here is—or is part of—a "criminal case."

Boyd v. *United States*, *supra*, arose under Section 12 of the Act of June 22, 1874, ch. 391, 18 Stat. 188, which prohibited the fraudulent importation of merchandise and provided that a person violating the section "shall * * * be fined in any sum not exceeding $5000 nor less than $50, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited." See 116 U.S. at 617. The government filed an information for forfeiture of certain goods, but did not file a criminal charge. The Court held that the Fifth Amendment attached in the forfeiture proceeding. But that conclusion was not based on a doctrine that forfeitures and monetary sanctions are generally "quasi-criminal" and that the Fifth Amendment privilege may uniformly be invoked in such proceedings. Instead, the Court premised its holding on the specific finding that the forfeiture of goods was one of the "penalties affixed to the criminal acts" prohibited by the statute. 116 U.S. at 634. The Court explained (*ibid.*):

> If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be.

It was on this basis alone that the Court stated that "proceedings instituted for the purpose of declaring the forfeiture of a man's property, *by reason of offences committed by him*, though they may be civil in form, are in their nature criminal." 116 U.S. at 634 (emphasis added).

In *Lees* v. *United States*, *supra*, the Court likewise indicated that the statutory penalty could have been recovered in either a criminal or civil action. 150 U.S. at 479. The Court also stressed that the penalty was intended as punishment (150 U.S. at 480), and the statute in question referred to a violation as an "offence," Act of Feb. 26, 1885, ch. 164, Section 3, 23 Stat. 333, thereby underscoring the punitive nature of the penalty. Accordingly, the Court followed *Boyd* in concluding (150 U.S. at 480-481) that the action, though civil in form in the particular instance, was criminal in nature and therefore one in which the defendant could not be compelled to be a witness against himself. See also *United States* v. *Regan*, 232 U.S. 37, 47, 50 (1914); *Hepner* v. *United States*, 213 U.S. 103, 111-112 (1909).

Similarly, *United States* v. *United States Coin & Currency*, *supra*, held that the Fifth Amendment privilege is applicable in a forfeiture proceeding under the internal revenue laws where the forfeiture is intended to be imposed "only upon those who are significantly involved in a criminal enterprise." 401 U.S. at 721-722. See also *id.* at 718, quoting *Boyd*

v. *United States, supra,* 116 U.S. at 634 (proceeding for forfeiture of a person's property "by reason of offences committed by him" are in their nature criminal for Fifth Amendment purposes). This reading of *Boyd* v. *United States* and its progeny—that application of the Fifth Amendment privilege is limited to situations in which the monetary penalty or forfeiture is premised on commission of an underlying criminal offense—was expressly reaffirmed by the Court in *One Lot Emerald Cut Stones* v. *United States, supra,* 409 U.S. at 236 n.6.

Thus, in the cases upon which respondent relied in the court of appeals, the monetary penalty or forfeiture was dependent on the occurrence of an integrally related criminal offense and was, in actuality, but a form of punishment for the commission of that offense. See *In re Daley,* 549 F.2d 469, 474-475 (7th Cir.), cert. denied, 434 U.S. 829 (1977). This nexus to a criminal offense serves to illuminate the apparent rationale of these holdings: Although a civil penalty or forfeiture proceeding is not a "criminal prosecution" for purposes of the Sixth Amendment, it may, in appropriate circumstances, be considered part of a broader "criminal case" for purposes of the Fifth Amendment privilege—a "criminal case" that could fairly be thought to embrace not only the prosecution itself, but certain ancillary or closely related proceedings the government may pursue to exact additional punishment for the same underlying criminal conduct. And if the defendant is compelled to give information that will result in a finding of liability in

a civil penalty or forfeiture proceeding that is intended to be the practical equivalent of an adjudication of guilt in a prosecution for the criminal offense, he may, as a practical matter, effectively "incriminate" himself even if he is never formally prosecuted.

That rationale is inapplicable here. The civil penalty provision in Section 311(b)(6) lacks such a direct nexus to an underlying criminal offense; it is imposed for violations of Section 311(b)(3), which contains no criminal sanctions. There is no indication that it was also intended to be an alternative or additional means of punishing offenses under the Rivers and Harbors Act. Our case is like *Helvering* v. *Mitchell, supra,* in which the Court rejected the argument that a provision for a 50% penalty on income tax deficiencies was barred under the Double Jeopardy Clause following an acquittal on criminal charges of fraudulently evading income taxes, finding that the assessment was remedial, not punitive in character. The Court there observed that where the monetary penalty or forfeiture is remedial, the defendant does not have the protection of a number of procedural rights normally associated with the criminal process, including the Fifth Amendment privilege against compulsory self-incrimination. 303 U.S. at 404. The Court noted that it did not read *Boyd* v. *United States, supra,* or *Lees* v. *United States, supra,* as holding to the contrary "where the sanction involved is remedial, not punitive." 303 U.S. at 404 n.12 Here also (as explained in Parts I and II of the brief), the

civil penalty is remedial, not punitive. It follows that Section 311(b)(6) does not trigger the Fifth Amendment privilege.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Instruction 5922.11B issued by the Commandant of the Coast Guard on October 10, 1974, provides in pertinent part:

GUIDELINES FOR THE ENFORCEMENT OF THE FEDERAL WATER POLLUTION CONTROL ACT, SECTION 311

I. It is the policy of the Coast Guard to assess a civil penalty for every violation of Section 311(b)(3) of the FWPCA.

* * * * *

II. *Notification.*

* * * * *

(2) The notification required by Section 311(b)(5) confers a statutory immunity from exploitation of that notification in any criminal case upon the person required to notify the Coast Guard (i.e., "person in charge" [*U.S.* v. *Mobil Oil*, 4 ERC 1405]).

(3) Any employee of any corporation, firm, partnership, etc., who notifies the Coast Guard of a discharge in accordance with Section 311(b)(5), entitles his corporation to that same immunity from exploitation of the notification in any criminal case *if* (1) that employee is acting *for or on behalf* or as an *agent of* that corporation *and* (2) that corporation is "*in charge*" of that vessel or onshore or offshore facility from which oil is discharged.

(4) The notification does *not* confer a statutory immunity from exploitation of that notification in a civil penalty proceeding. Assessment of a civil penalty is not affected in any way by the fact that the owner or operator initially notified the Coast Guard of the discharge.

(5) Therefore, if, during any stage of the investigation or civil penalty procedure, it becomes evident that there has been a failure to notify, a litigation report should be referred to the U.S. Attorney for the district in which the alleged violation took place for possible criminal action. The referral should give notice that the Coast Guard will institute civil penalty procedures under Section 311(b)(6). The fact that criminal action for Section 311(b)(5) may be pending, or prospective, should not affect the civil penalty procedure in any way.

(6) The immunity from criminal action based on notification extends generally to the Refuse Act, 33 U.S.C.A. § 407. There is, however, no immunity from prosecution for perjury or giving a false statement.

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III. *Assessment of Civil Penalty.*

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C. *The gravity of the violation*—This factor encompasses multiple considerations. The following questions should be considered by the Hearing Officer in weighing the gravity of the violation:

(1) Was the discharge intentional?

(2) Could the discharge have been prevented using reasonable care?

(3) Was the discharge caused by an act or omission of a type previously attributable (according to official records) to that same owner/operator so as to place him on notice of the particular hazard?

(4) Was the cause of the discharge a violation of the prevention regulations? Note that a *separate* violation may have occurred under Section 311(j).

(5) Did the owner/operator take special steps to try to avert the specific discharge?

(6) Was the discharge "unforseeable" by an experienced owner/owner knowing the weather, sea conditions and equipment?

(7) Was there a minimum amount of oil discharged?

Note that an affirmative answer to 1-4 *increases* the gravity of the violation and an affirmative answer in 5-7 *decreases* the gravity of the violation. Under no circumstances may response action by the owner/operator be considered as decreasing the gravity of the violation.

D. *The size of the business and the impact of the civil penalty on the ability of the owner or operator to remain in business*

These two factors go hand in hand and should be considered together. By requiring the Coast Guard to consider these factors, Congress intended that companies not normally be forced out of business or seriously impaired in remaining in business by the size of the civil penalty. It should be noted that there is

no provision to decline to assess a penalty altogether, but only to consider the size of the business of the owner/operator *in assessing* the civil penalty. The basic objective to be gained is to assess a civil penalty which will not, if all other considerations warrant a maximum penalty, place the business of the owner/operator in jeopardy or seriously impair his ability to continue to operate.

The "notice" letter solicits information concerning the size of the business of the owner/operator and the owner/operator's own evaluation of the effect a preliminarily determined civil penalty would have. Before the notice letter is sent, the size of the business of the owner/operator should have been considered in making the preliminary determination. This is normally possible because the businesses are generally known to the Hearing Officer or his staff or may be discovered by a call to the appropriate Captain of the Port or district finance personnel. If information is then received from the party charged which differs materially from the Hearing Officer's preliminary consideration, the Hearing Officer should reevaluate and adjust the preliminary determination before making the assessment. If no information is received, or if information is received which does not differ materially from the Hearing Officer's preliminary consideration, no adjustment because of the size of the business or effect on ability to continue to operate should be made prior to assessment.

The Hearing Officer should properly consider the overall corporate structure of the owner/operator.

For example, a small, wholly owned subsidiary of a large conglomerate or holding company should be considered as the larger conglomerate for purposes of considering the size and impact of a civil penalty. Most frequently, when one-vessel corporations are controlled by a parent operating company, the size of the parent company shall control.

E. *Minimum penalty*—Neither assessing a zero penalty nor issuing a letter of warning in lieu of a penalty meets the requirements of the statute that a penalty "shall be assessed." If the facts warrant the imposition of a minimum penalty, then the penalty should be reasonably sufficient to motivate owners and operators of vessels and facilities to take adequate measures to prevent future unlawful discharges. In a district where pollution incidents are somewhat controlled, a figure of $150.00 per incident might be adequate to provide the necessary motivation. In another district where violations are flagrant and preventative measures frequently disregarded, a somewhat higher minimum figure might be required to provide the same motivation. However, it must always be remembered that in any one case, the assessed penalty must be based on its own set of facts.

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I. *Use of records kept in accordance with Section 308 of the Federal Water Pollution Control Act in actions brought under Section 311(b)(5) and 311 (b)(6) of that Act*

Section 308 of the Federal Water Pollution Control Act provides authority for the Administrator of the Environmental Protection Agency to require the owner or operator of any point source to install, use, and maintain monitoring equipment or methods, to sample effluents, and to maintain records and make reports whenever required to carry out the objectives of several sections of the Federal Water Pollution Control Act, including Section 311. Section 308 also gives the Administrator of the Environmental Protection Agency or his authorized representative the right to have access to and to copy these records. These records are also to be available to the public except in certain narrowly defined situations.

Section 308 specifically cites a purpose of the record keeping as "determining whether any person is in violation of any . . . limitation, prohibition or effluent standard . . . of this Act . . ." It is appropriate to use records kept in accordance with Section 308 in the assessment of a civil penalty for discharges of oil or hazardous substances in harmful quantities under Section 311(b)(6) against the owner or operator and to use the records to notify under Section 311(b)(5). Use of Section 308 records should only be used where Section 308 information is forwarded to the Coast Guard by EPA and where obtaining such information is otherwise not practical. The Hearing Officer may obtain Section 308 records in cases where Coast Guard investigation is not practi-

cal, by initiating a request to the appropriate EPA Regional Administrator.

Use of Section 308 required records will not violate the discharger's constitutional rights against self-incrimination under the Fifth Amendment, because that provision applies only to criminal actions and the penalty assessed under Section 311(b)(6) is civil.

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